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No. 91-1847

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

MAYNARD B. MILLER,

Petitioner,

vs.

ROBERT BRIGGS and GRACE BRIGGS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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BEST AVAILABLE COPY

In Re Professional Investment Properties of America, Inc., 955 F. 2d 623, 136 B.R. [164] (9th Cir. 1992), A2 - A26, not only squarely and directly conflicts with Cooper Grocery Co. v. Park, 218 Fed. 42 (5th Cir. 1914), but also conflicts with reported decisions from each of the U.S. District Courts that have ruled on the main issue here presented; those decisions include In Re Chappell, 77 F. Supp. 573,576 (D.C. Ore. 1948) from within the Ninth Circuit.

The main issue here is whether a reference in the initial bankruptcy court filing, to an otherwise unperfected security interest against bankruptcy estate property, renders the bankruptcy estate's right to that property subordinate to such security interest. The Ninth Circuit holding below that such a reference affords such priority to such a security interest conflicts not only with the caselaw on the point, but with the plain

language of 11 U.S.C. § 544(a); i.e., because an ideal BFP's rights would not be diminished by such a reference neither are those of the bankruptcy estate.

Cooper, supra, applied article 6824 of the Revised Statutes of Texas (1911), which is now codified within article 6627 of Vernon's Civil Statutes of the State of Texas Annotated. The Ninth Circuit below applied Revised Code of Washington 65.08.070. A13 The said Texas race-notice statute explicitly provides that unrecorded conveyances shall be void as to creditors and purchasers "without notice" thereof; the said Washington statute substitutes "in good faith" for "without notice". The phrases are synonymous for purposes of said statutes. Biles-Coleman Lumber Co. v. Lesamiz, 49 Wn. 2d 436,438-439, 302 P. 2d 198, 199-200(1956); and Weber Showcase & Fixture Co. v. Waugh, 42 F. 2d 515,521 (D.C. W.D. Wash. S.D. 1930). Respondents, at last

sentence of page 3 of their Brief in Opposition, assert that the Texas law applicable in Cooper required that deeds of trust be recorded, regardless of any other notice thereof, to have any validity. Not only does the Texas statute quoted in Cooper, as well as its successor, article 6627, plainly state that only those without notice of unrecorded interests take free of them, but Texas caselaw clearly so holds, and so held when Cooper was decided: Benton v. Jones, 220 S.W. 193,197 (Tex. 1920), and Townsend v. Seber, 264 S.W. 211, 213-214 (Tex. 1924). The Texas statute in Cooper plainly does provide that actual notice of an unrecorded deed of trust can serve to "validate" such deed of trust; i.e., cause it to have priority over any given subsequent conveyance.

Respondents distinguish the instant case from Cooper on the grounds that the bankruptcy petition in Cooper was a

voluntary one, whereas here it was involuntary. That distinction is devoid of relevance according to law. 11 U.S.C. § 103(a) provides that chapter 5 of title 11, which includes 11 U.S.C. § 544(a), applies to every case brought under chapter 11 of title 11; this case was commenced under chapter 11 of title 11. 11 U.S.C. § 544(a) plainly applies as fully to involuntary cases commenced under 11 U.S.C. § 303, as it does to voluntary cases commenced under 11 U.S.C. § 301: E.g., Bridgewater v. Schaefer, 164 F. 2d 447 (5th Cir. 1947) and In Re Lendvest Mortg., Inc., 119 B.R. 199 (9th Cir. BAP 1990).

The Ninth Circuit based its decision below on the holding that notice to the bankruptcy trustee of a security interest, via a reference thereto in the initial bankruptcy court filing, subordinates the bankruptcy estate's title to that interest. Here there is no

unique, peculiar or even atypical fact or law which will narrow the application of that unsound holding; a holding which would deprive thousands of bankruptcy estates of rights which 11 U.S.C. § 544(a) is so clearly intended to provide. The said holding of the Ninth Circuit below will change the priorities among bankruptcy creditors contrary to the will and the authority of Congress; this Court should prevent such a usurpation of policy making authority. This Court should grant review.

Respectfully submitted,

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